Supreme Court, U.S.
FILED
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(17)

No. 99-2035

In the Supreme Court of the United States

COOPER INDUSTRIES, INC., PETITIONER,

v.

LEATHERMAN TOOL GROUP, INC., RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

WM. BRADFORD REYNOLDS
Counsel of Record
BRADLEY J. SCHLOZMAN
HOWREY SIMON ARNOLD & WHITE, LLP
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2402
(202) 783-0800

Attorneys for Petitioner

LAURENCE H. TRIBE
Counsel of Record
Hauser Hall 420
1575 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-4621

Attorney for Respondent

71pp

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RELEVANT DOCKET SHEET ENTRIES FROM
DISTRICT COURT PROCEEDINGS

09/20/96	1	COMPLAINT and JURY TRIAL DEMAND
10/29/96	13	MOTION by Plaintiff Leatherman Tool Grp FOR PRELIMINARY INJUNCTION
11/05/96	33	ANSWER [1-1] and COUNTER-CLAIMS FOR PATENT DECLARATORY JUDGMENT; FALSE ADVERTISING & SHERMAN ACT VIOLATION by Defendant Cooper Industries against Plaintiff Leatherman Tool Group Inc
11/13/96	37	MEMORANDUM by Defendant Cooper Industries IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION [13-1] (FILED UNDER SEAL)
11/25/96	48	REPLY TO DEFENDANT'S MEMORANDUM IN OPPOSITION by Plaintiff to [13-1] MOTION FOR PRELIMINARY INJUNCTION (FILED UNDER SEAL)

12/18/96	75	OPINION AND ORDER – Although this is by no means a clear question, I find that plaintiff has shown a likelihood of success on the merits of its trade dress infringement claims and that irreparable harm should be presumed in addition to finding a threat of actual irreparable harm. Accordingly, plaintiff's motion for a preliminary injunction #13 is GRANTED; defendant's motion or summary judgment on the issue of functionality #26 is DENIED.
12/20/96	78	STIPULATED ORDER GRANTING MOTION FOR ENTRY OF STIPULATED ORDER for preliminary injunction with respect to Defendant's advertising [76-1] ORDERED that Defendant Cooper Industries is hereby preliminarily ENJOINED from using the photographs of a multipurpose tool which appear on Coopers packaging for the ToolZall & Coopers advertising for the ToolZall or any photograph of a Leatherman Tool or components thereof unless the photograph or photographs are clearly & prominently marked to identify the Leatherman Tool Group Inc as the source of the pictured products; Signed 12/19/96 Honorable Malcolm F. Marsh (counsel notified)

12/20/96	78	ORDER by Honorable Malcolm F. Marsh GRANTED IN PART and DENIED IN PART Defendants MOTION FOR CLARIFICATION [77-1] as follows: 1) the Preliminary Injunction against Cooper Tools manufacture of the ToolZall is STRICKEN; Cooper is NOT ENJOINED from manufacture of the ToolZall; Only sales or offers for sale of the product; 2) This injunction applies only to domestic sales or offers for sale of the Cooper ToolZall; 3) Coopers request that the Court specifically identify which individual elements of Plaintiffs tool design are arbitrary and non-functional is DENIED (See formal 2-page Order) Signed 12/19/96 (counsel notified)
06/20/97	162	SECOND MOTION by Defendant Cooper Industries, Inc. FOR PARTIAL SUMMARY JUDGMENT DENYING CLAIM FOR PUNITIVE DAMAGES
07/21/97	198	ORDER by Honorable Malcolm F. Marsh DENYING Defendant's MOTION FOR Rule 26(g) FRCP SANCTIONS [179-1]; GRANTING Defendant's SECOND MOTION FOR JUDGMENT [173-1] ON THE PLEADINGS and DENYING Defendant's MOTION FOR PARTIAL SUMMARY JUDGMENT DENYING CLAIM FOR PUNITIVE DAMAGES [162-1] Signed 7/18/97 (counsel notified)

10/14/97	298	FIRST MOTION by Defendant Cooper Industries FOR JUDGMENT AS A MATTER OF LAW: (No likelihood of confusion as to new ToolZall Tool)
10/14/97	299	SECOND MOTION by Defendant Cooper Industries FOR JUDGMENT AS A MATTER OF LAW: (Punitive Damages)
10/14/97	300	MEMORANDUM IN SUPPORT by Defendant Cooper Industries of their SECOND MOTION FOR JUDGMENT AS A MATTER OF LAW: (Punitive Damages) [299-1]
10/15/97	304	MEMORANDUM IN SUPPORT by Defendant Cooper Industries of MOTION FOR JUDGMENT AS A MATTER OF LAW: (No likelihood of confusion as to new ToolZall Tool) [298-1]
10/16/97	310	MOTION by Defendant Cooper Industries, Inc. FOR JUDGMENT AS A MATTER OF LAW at the Close of all the Evidence
10/17/97	312	Court's JURY INSTRUCTIONS
10/17/97	315	VERDICT (see formal 4 page document)
10/23/97	318	BRIEF re: JUDGMENT, EQUITABLE RELIEF & PUNITIVE DAMAGES by Defendant Cooper Industries in Response to Civil Minutes of Jury Trial [313-1]

10/31/97	323	RESPONSE BRIEF by Plaintiff Leatherman Tool Group, Inc. re: JUDGMENT EQUITABLE RELIEF AND PUNITIVE DAMAGES
11/7/97	324	REPLY BRIEF by Defendant Cooper Industries, Inc. re: JUDGMENT, EQUITABLE RELIEF, AND PUNITIVE DAMAGES
11/17/97	325	JUDGMENT re: Verdict [315-1]; IT IS ORDERED AND ADJUDGED THAT LEATHERMAN TOOL GROUP, INC. has trademark rights in the overall appearance of the LPST; that Cooper shall pay to Leatherman $50,000 as damages for its acts of passing off and false advertising; that Cooper shall pay $4.5 million in punitive damages; that Cooper infringed Leatherman's copyright in a line drawing; that Cooper, its officers, agents, servants, employees and attorneys and those in active concert or participation with Cooper who receive actual notice of this injunction, are hereby enjoined from any further use of Leatherman's line drawing; and that all remaining claims and counterclaims (save attorney fees and costs to be addressed post-judgment) are dismissed with prejudice. Signed 11/14/97; Microfilmed 11/17/97; Honorable Malcolm F. Marsh; (see original 9 page document for further details); (counsel notified)

12/03/97	338	MOTION by Defendant TO REDUCE THE PUNITIVE DAMAGES JUDGMENT in View of Remedial Measures; Oral Argument Requested
12/03/97	339	MEMORANDUM IN SUPPORT by Defendant of MOTION TO REDUCE THE PUNITIVE DAMAGES AWARD [338-1]
12/03/97	344	MOTION (Conditional, in Part, Rule 59) by Defendant Cooper Industries FOR NEW TRIAL; Oral Argument Requested
12/03/97	345	MEMORANDUM IN SUPPORT by Defendant Cooper Industries of (Conditional, in Part) Rule 59 MOTION FOR NEW TRIAL [344-1]
12/03/97	346	RENEWED MOTION by Defendant Cooper Industries FOR JUDGMENT AS A MATTER OF LAW
12/03/97	347	MEMORANDUM IN SUPPORT by Defendant Cooper Industries of POST-JUDGMENT RENEWED MOTION FOR JMOL [346-1]
12/15/97	356	MEMORANDUM by Plaintiff Leatherman Tool Grp IN OPPOSITION to Cooper's Rule 59 MOTION FOR NEW TRIAL [344-1]
12/15/97	357	RESPONSE by Leatherman to Cooper's MOTION TO REDUCE THE PUNITIVE DAMAGES AWARD [338-1]

12/15/97	361	RESPONSE by Leatherman to Cooper's POST-JUDGMENT RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW [346-1]
12/24/97	367	MEMORANDUM IN SUPPORT by Defendant Cooper Industries of MOTION FOR JUDGMENT AS A MATTER OF LAW [346-1]
12/29/97	368	REPLY TO Leatherman's RESPONSE by Defendant Cooper Industries re [338-1] MOTION TO REDUCE THE PUNITIVE DAMAGES JUDGMENT
12/29/97	369	REPLY TO RESPONSE by Defendant Cooper Industries re [344-1] MOTION FOR NEW TRIAL
01/07/98	370	ORDER by Honorable Malcolm F. Marsh: Defendant's MOTIONS FOR JUDGMENT AS A MATTER OF LAW [346-1], FOR A NEW TRIAL [344-1] and TO REDUCE THE PUNITIVE DAMAGES JUDGMENT [338-1] are DENIED. IT IS SO ORDERED Signed 1/7/98 (counsel notified)
02/04/98	376	NOTICE OF APPEAL to Court of Appeals by Defendant Cooper Ind. Inc. from the Judgment [325-2]

RELEVANT DOCKET SHEET ENTRIES FROM COURT OF APPEALS

08/06/98	Filed original and 15 copies Appellant Cooper Industries' opening brief (Informal: no) 63 pages and five excerpts of record in 02 volumes [Vol 1 of the Exc is SEALED]; served on 8/3/98 [98-35147, 98-35415]
09/02/98	Filed original and 15 copies appellee Leatherman Tool's 66 pages brief, 05 Suppl Exc. 02 vols., served on 9/1/98 [98-35147, 98-35415]
09/21/98	Filed original and 15 copies Cooper Industries' reply brief, (Informal: no 32 pages; served on 9/15/98 [98-35147, 98-35415]
05/04/99	ARGUED AND SUBMITTED TO William C. CANBY, Thomas G. NELSON, Jeremy Fogel [98-35147, 98-35415]
12/17/99	FILED OPINION: THE PORTION OF THE JUDGMENT THAT GRANTS LEATHERMAN A PERMANENT INJUNCTION IS REVERSED NO COSTS ARE ALLOWED. (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. William C. CANBY; Thomas G. NELSON; Jeremy Fogel, author.) FILED AND ENTERED JUDGMENT. [98-35147, 98-35415]

12/17/99	FILED MEMORANDUM DISPOSITION: WE AFFIRMED THE PUNITIVE DAMAGE AWARD AND REMAND FOR FURTHER CONSIDERATION OF THE ATTORNEYS' FEES AWARD. (Terminated on the Merits after Oral Hearing; Affirmed; Written, Unsigned, Unpublished. William C. CANBY; Thomas G. NELSON; Jeremy Fogel, author.) FILED AND JUDGMENT. [98-35147, 98-35415]
01/03/00	Filed original and 50 copies Appellant Cooper Industries petition for rehearing with suggestion for rehearing en banc 12 p. pages, served on 12/30/99 (PNL & ACTIVE JDGS)
03/03/00	Filed order (William C. CANBY, Thomas G. NELSON, Jeremy Fogel): The P/R and the P/R en banc rehearing are denied [98-35147, 98-35415]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

LEATHERMAN TOOL GROUP, INC.,	)
Plaintiff,	) No. CV-96-1346-MA
vs.	) STIPULATION
	) CONCERNING
COOPER INDUSTRIES, INC.,	) LEATHERMAN'S
	) COPYRIGHT
Defendant.	) CLAIM

The parties hereby stipulate to following concerning Leatherman's claim for copyright infringement against Cooper (Fifth Claim For Relief):

1. Judgment of liability for copyright infringement shall be entered against Cooper;

2. Leatherman will be awarded no damages, costs, or attorney's fees in connection with the copyright claim; and

3. The jury will not be instructed in any respect concerning Leatherman's copyright claim and will not render a verdict on the copyright claim.

Dated: October 6, 1997

By: /s/
Peter Staples
Julianne Ross Davis
Bruce W. DeKock
CHERNOFF, VILHAUER, McCLUNG & STENZEL, LLP
One S.W. Columbia, Suite 600
Portland, OR 97258
Telephone: (503) 227-5631
Attorneys for Plaintiff
Leatherman Tool Group, Inc.

Dated: October 6, 1997

By: /s/
David J. Earp, OSB # 96269
Garth A. Winn, OSB # 92158
John D. Vandenberg, OSB # 89375
KLARQUIST SPARKMAN CAMPBELL LEIGH & WHINSTON, LLP
121 S.W. Salmon Street, Suite 1600
Portland, Oregon 97204
Telephone: (503) 226-7391
Attorneys for Defendant
Cooper Industries, Inc.

Of Counsel:

Cesar Arreaza
Counsel, Litigation
Cooper Industries
600 Travis Street, Suite 5800
Houston, TX 77002

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

LEATHERMAN TOOL GROUP, INC., an Oregon corporation Plaintiff, vs. COOPER INDUSTRIES, INC., an Ohio corporation, Defendant.	) Civil No. 96-1346-MA) STIPULATED ORDER FOR PRELIMINARY INJUNCTION WITH RESPECT TO DEFENDANT'S ADVERTISING

Based on the stipulation of the parties, it is hereby

ORDERED that defendant Cooper Industries, Inc., its officers, agents, servants, employees and attorneys, and those in active concern or participation with Cooper who receive actual notice of this preliminary injunction, are preliminarily enjoined from using the photographs of a multipurpose tool which appear on Cooper's packaging for the ToolZall (Exhibit A) and Cooper's advertising for the ToolZall (Exhibits B-D), or any photograph of a Leatherman tool or components thereof, unless the photograph or photographs are clearly and prominently marked to identify the Leatherman Tool Group, Inc. as the source of the pictured product.

DATED: December 19, 1996

/s/
MALCOLM F. MARSH
United States District Judge

Stipulated:

Leatherman Tool Group, Inc.

By: /s/
Bruce Dekock
of Attorneys for Plaintiff

By: /s/
Garth Winn
of Attorneys for Defendant

Instruction No. 39

Leatherman has asked for punitive damages with respect to its unfair competition claim. Punitive damages may not be awarded on Leatherman's claim for trade dress infringement. Punitive damages may be awarded only if you find that Leatherman is entitled to actual and/or compensatory damages on the unfair competition claim. The purpose of punitive damages is to punish a willful, wanton or malicious wrongdoer and to deter that wrongdoer and others similarly situated for like conduct in the future. Leatherman has the burden of proving by clear and convincing evidence that Cooper acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights. Malice is the intentional doing of an injurious act without justification or excuse. A person acts recklessly when his acts or omissions are done in conscious disregard of the known probable consequences.

In establishing the amount, if any, of punitive damages to award you should consider the following factors:

1. The character of the defendant's conduct that is the subject of Leatherman's unfair competition claims;

2. The defendant's motive;

3. The sum of money that would be required to discourage the defendant and others from engaging in such conduct in the future; and

4. The defendant's income and assets.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

LEATHERMAN TOOL GROUP, INC., an Oregon corporation, Plaintiff,	
vs.	No. CV-96-1346-MA
COOPER INDUSTRIES, INC., an Ohio corporation, Defendant.	VERDICT

1. Has Leatherman proved by a preponderance of the evidence that it has trademark rights in the overall appearance of the Pocket Survival Tool?

Yes__X__ No_____

If you answered yes, go to question 2. If you answered no, go to question 9.

2. Has Leatherman proved by a preponderance of the evidence that the original ToolZall infringes Leatherman's trademark rights in the Pocket Survival Tool?

Yes__X__ No_____

If you answered yes to question 2, please answer questions 3 and 4.

If you answered no, go to question 5.

3. Was Cooper's infringement willful?

Yes__X__ No_____

4. What amount of damages do you find should be awarded to Leatherman due to the infringement of its trademark by the original ToolZall?

$__0__

5. Does the new ToolZall infringe Leatherman's trademark rights to the Pocket Survival Tool?

Yes_____ No__X__

If you answered yes, go to question 6. If you answered no, go to question 9.

6. Did Leatherman abandon its right to assert trademark rights against the new ToolZall?

Yes_____ No_____

If you answered no, please answer question 7 and 8. If you answered yes, go to question 9.

7. Was Cooper's infringement willful?

Yes_____ No_____

8. What amount of damages do you find should be awarded to Leatherman due to the infringement of its trademark by the new ToolZall?

$_____

9. Has Leatherman proved by a preponderance of the evidence its claim for passing off?

Yes__X__ No_____

10. Has Leatherman proved by a preponderance of the evidence its claim for false advertising?

Yes__X__ No_____

11. Has Leatherman proved by a preponderance of the evidence its claim for unfair competition?

Yes__X__ No_____

If you answered yes to questions 9, 10 or 11, go to question 12. If you answered no to questions 9, 10 and 11, have the presiding juror sign this verdict form and return it to the Courtroom Deputy.

12. What amount of damages do you find should be awarded to Leatherman for Cooper's passing off and/or false advertising?

$__50,000__

If you answered yes to question 11 and if you entered a damage award in response to question 12, please answer questions 13 and 14. If you entered 0 or if you skipped the question, do not answer questions 13 and 14.

13. Has Leatherman shown by clear and convincing evidence that by engaging in false advertising or passing off, Cooper acted with malice, or showed a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights?

Yes__X____ No_____

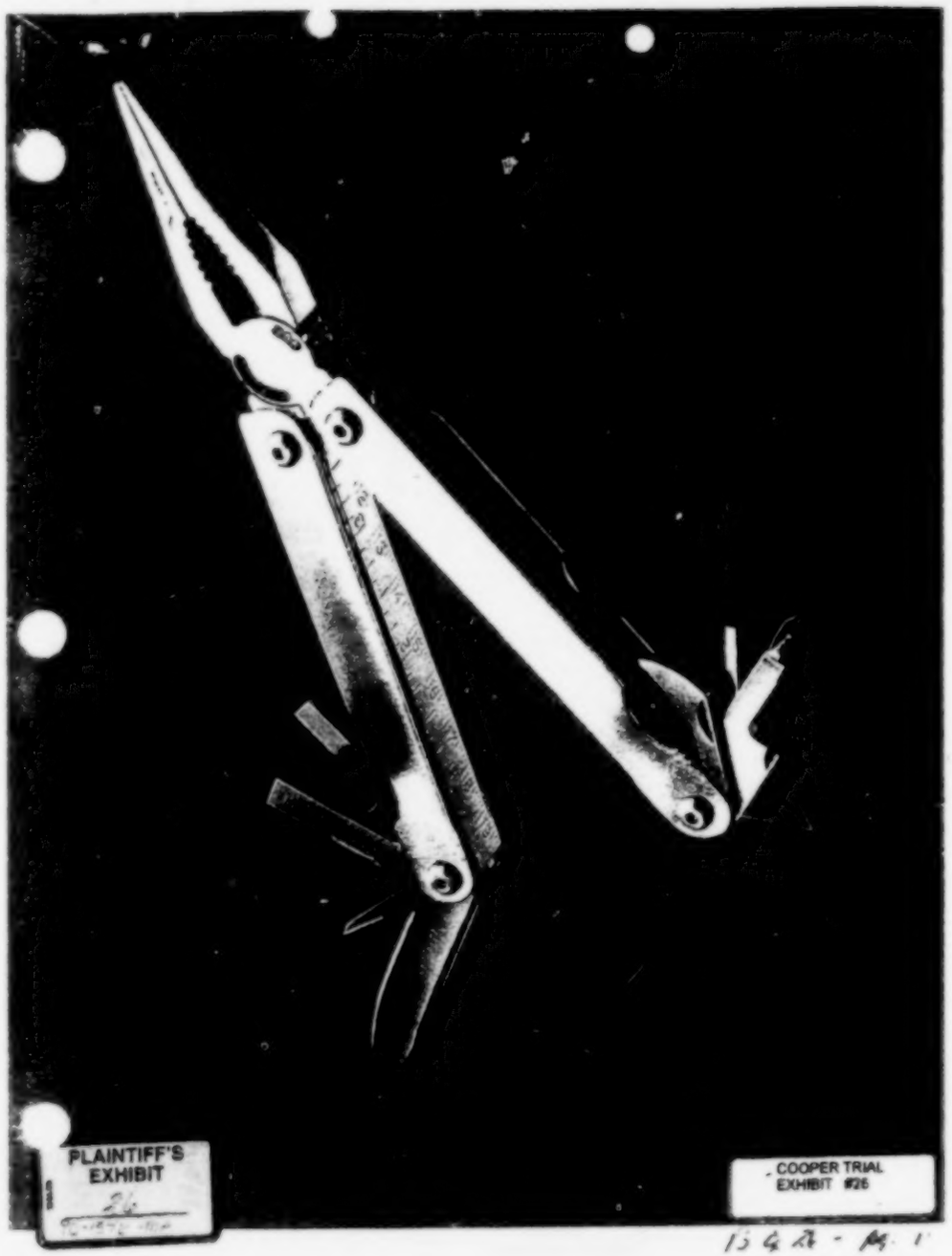
If you answered yes to question 13, please answer question 14.

14. What amount of punitive damages should be awarded to Leatherman?

$____4.5 million___

DATED this 17th Day of October, 1997.

/s/_____
Presiding Juror



COPY: J.
FYI
Rick

NEW PRODUCT: COOPERMAN TOOL

Market :
Domestic: Size: 6M pcs. - $150M+
Growth: 3%

International:
Size: To be determined
Growth:

Opportunity: Introduce an improved tool for the professional industrial market and tool oriented DIY'er

Competition:

Leatherman: Originally invented this line approx 10 years ago. Came out with a basic tool that was intended to be a 9 tools in 1 combination tool that could be carried on the belt. The original intent was to reach the sportsman market. As it turned out, this tool also became the standard tool carried by many tradesman and professionals that have on the go type jobs. Recently, two new products have been developed and introduced - a Mini Leatherman and the Leatherman Ultra Tool. All tools are stainless steel. Leatherman currently produces and sells 200,000 tools per month or 2.4 m per year.

Gerber: As part of their belt knife program, entered this market during the past five years. Their tool is similar in many ways, but different enough to circumvent the Leatherman patents. They do approximately 1.5 -- 2m units annually, primarily to the sporting goods market.

SOG: Make a similar tool to that made by Gerber.

Low priced competition: A few similar, but larger products have recently entered the market selling at retail in the $19.99 range. These appear to be crude, heavy type knock-offs that in all probability are not selling well.

Product Line: To be a player we would need to produce at the Leatherman quality level, at prices in the Leatherman range (Distr price $27-$28 - reg tool and $10 more for the Ultra tool) Our product will need to be differentiated, with somewhat improved attributes and features. Since all of the Leatherman components are out sourced, we should have an expected manufacturing advantage on many of the parts.

Market: Our customers generally sell this type of product on an over the counter basis, as do they the Leatherman Tool. By my estimate, all things being equal, our programs – should be tie breakers in many of our industrial accounts

Attorneys' Eyes Only

C000241

PLAINTIFF'S EXHIBIT 67

67 C000241-243

BEST AVAILABLE COPY

In addition, there is a large GSA contract for 100,000 pcs issued annually.

Our take @ 5% of the Leatherman market should in the $3M range
Desired Market Position Plan:

- o Take 5% of Leatherman sales in year two. All to come from the industrial side.
- o Quote GSA business at break-even or better margin to secure base volume
- o Enter catalog sales area thru Reps to reach outdoorsman side of market.

Expect 1/2 of 1% (Gerber/SOG sales) $350-400K in sales 1st year. 3% sales growth in years two thru seven. ?

Preliminary Cost Estimate:
Std Cost: $14.15
Tooling: $119,000.

Startup: 8 months from approval.

75000 units

BEST AVAILABLE COPY

Attorneys' Eyes Only
C000242

Chisholm & Associates

RALEIGH · LONDON

June 10, 1996

Mr. Pete Jones
CooperTools
P.O. Box 30100
Raleigh, NC 27622

RE: PROTOTYPES

Dear Pete:

Enclosed please find the two prototypes requested. Again, due to scheduled photo shoots for these products, we will need to have these back no later than June 12 A.M.

If you should have any questions please feel free to call.

Sincerely,

Tara Reid

Tara Reid

Enclosures

cc: Bill Bliss
David Sendall
Alfred Chisholm
Holly Young 6193-US

PLAINTIFF'S EXHIBIT 100 CV 96-134-M4

PLAINTIFF'S EXHIBIT NO. 14 FOR IDENTIFICATION DATE: 9/4/2001

COOPER TRIAL EXHIBIT #100

C&A0177

4505 Falls of Neuse Rd.
Suite 650
Raleigh, NC 27609
919.876.2065
Fax 919.876.2344

William R. Bliss
Manager, Marketing Services

Cooper Industries
Cooper Hand Tools Division
3535 Glenwood Avenue
Raleigh, NC 27622
Office (919) 783-2013
Marketing Fax (919) 783-2067

FAX TRANSMISSION

COOPER
CooperTools

1 page (including cover sheet)

DATE: November 20, 1996

TO: CooperTools Sales Personnel

FROM: Bill Bliss

SUBJECT: ToolZall Literature Recall

At the request of Cooper Industries attorneys, we are recalling stocks of selected literature pieces that have been distributed and are being stored by you. **This recall does not affect any literature that you have already given to your customers and is in their possession.** Revised reprints of 55074 and 55139 will be in stock by 12-6-96. Item 55184 will not be reprinted; suggested replacements are items 55902 or 55845. All other items will be revised and reprinted by mid-December.

The following inventory form should be completed and included with the materials to be returned. The package should be sent to the following address to arrive no later than Monday, December 2:

COOPERTOOLS
3535 Glenwood Avenue
Raleigh, NC 27612 Attn: Jean Wheless

Salesperson_____ Territory_____

Item Number	Description	Quantity Returned
55074	ToolZall 4-page Brochure	
55139	ToolZall Imprint Flyer	
55184	Industrial Imprint Flyer	
55119	QuickFire 4-page Brochure	
55069	QuickFire 4-page Brochure (Spanish)	
55132	MultiMaster 4-page Brochure	
55070	MultiMaster 4-page Brochure (Spanish)	
55054	Fall 1996 New Products Brochure	
55047	Fall 1996 New Products Brochure (Spanish)	

PLAINTIFF'S EXHIBIT
217
96-1346-MA

ATTORNEY'S EYES ONLY

C005762

Leatherman v. Cooper Industries
Toolzall Profit and Loss
International and Domestic

	1996	Through July 1997	Total
Net Trade Sales (1)	$ 287,343	$ 197,822	$ 485,165
Cost of Sales at Standard (2)	$ 180,495	$ 140,216	$ 320,711
Manufacturing Variances on Product Sold (3)			$ 114,000
Gross Profit			$ 50,454
Capital Expenditures (4)	$ 303,496	$ -	$ 303,496
Inventory:			
WIP at Standard (5)	$ -	$ 664,036	$ 664,036
Finished Goods at Standard (6)	$ -	$ 322,896	$ 322,896
Manufacturing Variances (3)			$ 114,916
Plant Support (7)	$ 45,707	$ 36,018	$ 81,725
Selling and Marketing (7)	$ 41,695	$ 33,921	$ 75,616
General and Administrative (7)	$ 12,044	$ 12,378	$ 24,422
Total Loss on Product			$ (1,536,653)

Sources:

(1) 1996 Net Trade Sales Bates # C008239, #C008240 and # C008241
1997 Net Trade Sales Bates #C008238 and #C008255

(2) Toolzall Profit Analyses - 1997 July YTD Bates #C008238
ToolZall Profit Analyses - 1996 Bates #C008237

(3) Departmental Expense Report Bates #C6995 - #C7000; ToolZall proportional allocations taken from discussions with Cooper

(4) Bates #C7003

(5) Bates #C008263

(6) Bates #C008235

(7) Bates #C008235

CONFIDENTIAL
TORNEYS EYES ONLY

we were just looking at there. Our maintenance manager

asked me if I had ever seen this tool before.

Q. And could you tell the jury what is Exhibit 14?

A. It is an advertisement from MRO Magazine for Wiss and

Crescent depicting a Leatherman tool. That is being touted

as a ToolZall, or being shown as being manufactured by

Cooper.

Q. And were you asked to do any comparison with respect

to that photograph?

A. Yes, I was. The only comparison I randomly did was to

look at it. I immediately concluded it was the same tool

in the photograph that I had seen previously, which, I

believe, it is.

Q. All right. Now, what I would like you to do now is to

turn to what we have marked as Exhibit 26. It should be in

that book as well.

A. Yes, I found it.

Q. What is Exhibit 26?

A. Exhibit 26 is a photograph of a Leatherman tool with

fasteners changed and the name, Leatherman, somehow removed

from the plier jaws.

Q. And do you know where this photograph came from?

A. Yes, I do.

Q. And where did it come from?

A. I have been told this photograph comes from Copper's

advertising agency.

Q. Is that a Leatherman tool?

A. I believe it is.

Q. Okay. If you could turn then to Page 4 of Exhibit 26.

A. Okay.

Q. I want you to look at Page 4 and Page 6 together.

A. 4, yes.

Q. On Page 4 can you tell the difference on Page 4 of Exhibit 26?

A. Page 4 are some handwritten notes and Page 6 is a photograph of a Leatherman tool.

Q. And is there some writing there on Page 4 of Exhibit 26?

A. Yes, there is.

Q. What does it say?

A. It says, retouch out USA and other logo."

Q. And can you tell, Mr. Rivera, I'm going to hand you a negative here that is reflected in Exhibit 26 there. This is the actual entire -- we have been trying to get our gizmo to work and it won't. Have you taken a look at that

photograph before, that entire negative?

A. Yes, I have.

Q. And can you tell the jury what it is?

A. It is a photograph of a Leatherman tool with fasteners

changed and then on it it has the -- it has the same note I

just read with the logo pads on the plier jaws.

Q. Can you see what is being done on the entire negative,

what is being retouched?

A. Yes. It would be the Leatherman where it used to say

Leatherman USA, are going to be retouched to be removed.

Q. And do you know where that entire negative comes from?

A. I have been told this comes from Cooper's advertising

agency also.

Q. All right. I want you to turn now to Pages 24, 26 of

this Exhibit 26. By the way, the photograph that is in

Exhibit 26 that we just looked at, is that the same

photograph that appears in Exhibit 14?

A. Yes, it is.

Q. Now, I'm going to hand you an entire negative here

marked as C4, and ask you if you have taken a look at that

before?

A. Yes, I have.

MS. DAVIS: We got it working now so I can put

it up on the screen.

BY MS. DAVIS:

Q. And when you compare Pages 24 and 26, and you look up

at the entire negative that is shown up on the screen

there, can you tell what is being done there?

A. That photograph is also being retouched.

Q. Is that the same photograph that showed up in Exhibit

A. Exhibit 31 is brochure for Crescent ToolZall line art,

what they call the ToolZall.

Q. Okay. Have you taken a look at that line art before you came here today?

A. Yes, I have.

Q. Is that a ToolZall in that line art or a Leatherman tool?

A. I believe it is a Leatherman tool. The reason I believe that is -- there are a couple of features on the line art that aren't on the ToolZall.

One, if you look closely you see it has Leatherman type nail nick on it. It doesn't have the V-shape spring that the ToolZall finally ended up having.

Q. Okay. If you turn now to what has been marked as Exhibit 32. I think it is 32 in the book there.

A. Yes.

Q. Tell the jury what that is.

A. That is a photocopy of the page that we received for the ToolZall on the package depicting a Leatherman tool with the fasteners changed.

Q. Where did that package come from?

A. That is a package that we bought from Logo Tool and Supply hardware store, basically that our company buys stuff from when we first bought ToolZall.

Q. You bought that on the open market?

Timothy Miller – Cross-Examination (905)

A. When we pulled the advertising?

Q. Well, when you pulled the advertising, you pulled the packaging, when you pulled all of the material that showed the modified Leatherman product you sent a memo out to your sales force, didn't you?

A. Yes, I did.

Q. You sent that out or you had Mr. Bliss send a memo out in November; isn't that right?

A. I believe I sent out a letter to our sales organization in November and Mr. Bliss probably did so too.

Q. Take a look at 217.

A. Okay.

Q. And that is dated November 20, 1996. That is from Bill Bliss and the subject is ToolZall literature recall;

is that correct?

A. That is correct.

Q. It says right there on the front on the first paragraph, read that first sentence.

A. The first sentence, "at the request of Cooper Industries' attorney we are recalling stocks of selected literature pieces that have been distributed and are being stored by you."

Q. Now, that next sentence, that is in bold type, what does that next sentence say?

A. "This recall does not affect any literature that

Timothy Miller – Cross-Examination (906)

you have already given to your customer and is in their possession."

Q. And it is true, Mr. Miller, that in December when you decided you needed to agree to have these promotional materials pulled from the market that you didn't send a

letter out to your customers asking for that back, did you?

A. We did not.

Q. You didn't send a letter out to the mail order catalogs asking for the materials back either, did you?

A. No, we did not.

Q. You didn't send a letter out to your cooperative advertisers asking for their materials back either, did you?

A. No, we did not.

Q. You didn't do any of those things in January of 1996,

did you?

A. No, I don't believe we did.

Q. You didn't do that in February of 1996 -- or 1997, did

you?

A. No, we did not.

Q. You didn't send any kind of recall to the customers,

or the catalog people, or to the cooperative advertisers,

you didn't send that in March either, did you?

A. No, we did not.

Q. And the first time that you ever sent any kind of

notification to the customers, the people that were using these photographs was on April 24, 1997; isn't that true?

A. Well, that would have been -- that was the first time we would have sent a written notice. We asked our salespeople to contact the customers. We prefer one-on-one

contacts to tell them that we are no longer selling the product, and that they should take whatever --

Q. Mr. Miller, thank you for your answer. Isn't it true that you didn't send a letter to these people in this big printout here? You didn't sent a letter to them asking for those materials back until April 24, 1997?

A. That would be correct.

Q. You didn't do that. The only reason you did that is

because I was calling up your lawyers having a cow because

things were showing up in numerous articles all over; isn't

that true?

A. No.

MR. VANDENBERG: Objection, Your Honor.

THE COURT: If you are getting to the communication with attorneys --

MS. DAVIS: No, I'm not, Your Honor.

THE COURT: Okay. Go ahead and answer the question.

THE WITNESS: Repeat the question again.

Alabama, wasn't it? It was in Utah?

A. Utah is different than Alabama, yes.

Q. Since that time, I think it was in April, another 750 fliers were ordered in which it showed the modified Leatherman tool and it said offer expires June 7, 1997;

that happened, didn't it?

A. Yes.

Q. And then in Colorado in April another customer Aviation Inc ordered another 425 fliers that showed the modified tool; isn't that what happened?

A. Yes.

Q. Isn't it true that another customer, beyond those we have already talked about, ordered 250 fliers showing the modified Leatherman tool in April of this year?

A. Would that be the sixth? That is six.

Q. It is a customer in Colorado, I can dig out the name. I have these. There were two customers in Colorado?

A. I believe that is correct.

Q. Okay. And then somebody in Arizona had another 2400 fliers printed up in April of 1997 showing the modified Leatherman tool; isn't that correct?

A. Yes. The customer had fliers printed up, yes.

23 Q. You are also aware that the flier in the line art

24 showing the modified Leatherman tool showed up in a number

25 of national publications between December of 1997 and all

1 of 1997; isn't that right?

2 A. I believe that to be true. We introduced the product,

3 we aggressively tried to put them in fliers.

4 Q. Isn't it true that in those national magazines, you

5 can't tell me how many people have seen the modified

6 Leatherman tool after December of 1996, when you agreed to

7 have that pulled off the market, you can't tell me how many

8 people have seen the modified tool in either magazines,

9 fliers, or newspaper articles, or newspapers

10 advertisements, or brochures, you can't give me a number?

11 A. No, ma'am, there is no way of doing that.

12 Q. Okay. Isn't it true that the last time -- well, would

13 you agree with me that the last time that we both know

14 about that, that showed up was in The Oregonian just August

15 11, 1997?

16 A. I have not seen anything in The Oregonian.

17 Q. You didn't know about The Oregonian?

18 A. I have not seen The Oregonian.

19 Q. Okay. And in December of 1996, I believe you

20 testified to this, if you answered the question I apologize

21 asking it twice. You didn't send a letter to the mail

22 order catalogs telling them don't use the line art, don't

23 use those photographs showing the modified Leatherman tool?

24 A. No, we didn't send a letter to our customers. We sent

25 a letter to our sales organization.

1 Q. And then after all of these adds showed up sometime, I

believe in February of 1997, for some of your packaging and

advertising for the European market, did you use the

photograph again of the modified Leatherman tool?

A. I believe it did show up, yes.

Q. That was something that Cooper Industries did in

November?

A. Our advertising agency designs our packaging with our

approval, of course.

Q. And do you know how many people overseas saw that

package of a ToolZall, or I think you called it a Nicholson

in Europe depicting a modified Leatherman tool, do you know

how many people saw the packaging?

A. No, ma'am, I have no way of knowing that.

Q. Do you know how many people saw those advertising

fliers showing the modified Leatherman tool?

A. I have no way of knowing that.

Q. Do you know when those were recalled by Cooper?

A. I believe the moment we found out that the product was

on there, the mock-up photo was on there we stopped it

immediately.

Q. Did you find out about that when I went to Raleigh

North Carolina and took the deposition of your salesperson,

is that when you first found out?

A. I don't know when.

surprisingly a memo is not addressed directly to him. It is addressed to myself and J. J. Vlietstra, two folks he knew one of them worked for him. So it wasn't directly effecting him, whether he was copied on it. I'm not surprised he read it and discarded it.

But the second reason it also happened -- it wasn't long after that memo that he submitted his resignation to Cooper and he left. So about that time he may have known he was going to leave the company.

Q. Back to the packaging in front of you. And have you looked at the photograph of the tools being used. What do you understand now is depicted in those photographs?

A. Well, we have talked a lot about the mock-up photograph. And the photographs that are here are showing that mock-up, are not the mock-up photograph but the mock-up products. That is what is depicted in this

picture.

Q. Tell us how the mock-up got in those photographs?

A. Well, we talked about mock-ups and how they are requested, primarily requested for initial layouts on advertisement -- this one, and so I later on used mock-ups for initial layouts, and then when you get closer to -- when you are actually going to shot you want to get at least as close to the final product as possible, or if you can get the real product and take the picture of that.

Q. Sent it to your international operations, correct?

A. Yes.

Q. You told people it was a ToolZall, that is right, isn't it?

A. Yes. Obviously it is on the faxcom discussing ToolZall, yes.

Q. You didn't intend to do that, that is what you are

telling us. You didn't intend to use a Leatherman tool to represent a ToolZall when you sent out this faxcom?

A. We sent a drawing that looks like a ToolZall in this case.

Q. And is it true when you sent that drawing to Mr. James you knew that it was going to be put in an international faxcom, didn't you?

A. Yes, I did.

Q. You knew it was going out all over the world?

A. To Cooper's international operations, yes.

Q. You had no idea who it was going to be shown to once it got put out all over the world?

A. Well, it is our understanding the faxcoms are internal documents, not to be shown outside the company.

Q. It is true when you sent that out it did get shown to customers?

A. We have identified four people, or four customers that eventually saw that, yes.

Peter M. Jones – Deposition Excerpt (11)

What did you give to Mr. Meyers?

A. I gave him a -- something very much similar to what you see right there.

Q. Did you give him a picture of a drawing? Is that it?

A. Yeah.

Q. How did you prepare the drawing from the flier, the Leatherman flier?

A. I made a copy of it, cut it out, and gave it to Ray.

Q. By "cut it out," did you cut the drawing out? Is that what you did?

A. Um-hmm.

Q. So you made a photocopy of the Leatherman flier?

17 A. Yes.

18 Q. Did you do anything else to the drawing of the tool

19 in the Leatherman flier before you gave it to

20 Mr. Meyers?

21 A. I removed the term "Leatherman" and any marks that

22 were on the handle.

23 Q. How did you remove marks?

24 A. With White Out.

25 Q. Why did you remove the Leather marks from the

3 drawing?

4 A. We obviously didn't want to show it.

5 Q. Why did you not want to show the Leatherman marks?

6 A. We didn't want any reference to Leatherman.

7 Q. Is that because you wanted a depiction of the

8 ToolZall?

9 A. We wanted a representation of the ToolZall, yeah.

10 Q. Who did you give that drawing to that you prepared

11 from the Leatherman flier?

12 A. To Mr. Meyers.

13 Q. Did you give it to anyone other than Mr. Meyers?

14 A. No.

15 Q. What did Mr. Meyers do with the drawing?

16 A. He had the ability to scan it into our computer

17 system.

18 Q. What do mean by "scan it"? What does that mean?

19 A. I'm not sure what you call it, other than a scanner

20 that can scan a drawing and create a file out of

21 that.

22 Q. So there's the ability to create an electronic

23 file, on the computer system, of the drawing; is

24 that it?

25 Yeah.

Peter M. Jones – Deposition Excerpt (84)

Tool?

MR. WINN: Object. Lack of foundation.

THE WITNESS: No.

BY MR. DEKOCK:

Q. Who would know how many shoots they did?

A. They would, Chism.

Q. Do you know how many different mock-ups of Cooper Tools Chism photographed?

A. Do I know how many photographs or --

Q. How many mock-ups, how many different mock-ups.

A. I don't believe it could be any more than two, if it's even that many.

Q. Did Chism use just one mock-up for the advertisements that it developed for the Cooper Tool?

A. Yes.

Q. Did you ever see that mock-up?

A. I don't remember seeing it.

Q. Did Chism use the same photographs in June and June of the mock-ups for all of the advertisements that it did for the Cooper Tool?

MR. WINN: Object as vague and compound.

THE WITNESS: I'm not sure.

BY MR. DEKOCK:

Peter M. Jones – Deposition Excerpt (124)

BY MR. DEKOCK:

Q. Mr. Jones, before I forget, what I want to do is play for you a portion of the videotape. And we've got a monitor set up here

(Videotaped played.)

BY MR. DEKOCK:

Q. Okay, I paused the videotape, Mr. Jones. Can you identify this videotape for me?

A. This is the new product videotape.

Q. This is the one that you made to compare the Cooper Tool with the other competitor tools?

A. It's the one that we made for the salesmen.

Q. And it's the only videotape you made?

A. Yes.

Q. Right now on the screen there are two tools shown on the videotape. The one on the right has the handles open, showing the pliers and all of the tools folded out. There's a tool on the left that's being held in what appear to be your hands; is that right?

A. Yes.

Q. Do you know what the tool on the left is?

A. It's hard to tell from this. It's hard to tell.

Q. And let me play a little bit more and see if

you can identify it for me.

(Videotape played.)

BY MR. DEKOCK:

Q. Did that help at all, showed you unfolding the tool?

A. It's not a ToolZall. I'm not sure what it is.

Q. Are you able to identify the tool based on the fasteners that are shown there on the tool on the left?

A. I can -- based on the fasteners, I can say it's not a ToolZall.

Q. Can you tell based on the fasteners what kind of tool it is?

A. No.

Q. Isn't it a Leatherman Tool?

A. no, I don't know that.

Q. Is there any other tool that you're aware of

that looks like the tool shown on the left other than a Leatherman Tool?

A. Sorry, say that again.

Q. Is there any other tool that you're aware of that looks like the tool on the left other than a Leatherman Tool?

MR. WINN: I'm going to object to the extent the screen is difficult to see.

Q. So you can't tell me whether they're from a Leatherman Tool, right?

A. Right.

Q. And you can't tell me that it isn't, that the component parts aren't from a Leatherman Tool, right?

A. Say that again.

Q. You cannot tell me that the component parts are not from a Leatherman Tool: is that right?

MR. WINN: Object as vague.

THE WITNESS: Right.

BY MR. DEKOCK:

Q. If you turn the page, on page 3, the first full sentence of it says, "I understand, however, that some components such as the pliers and possibly the knife blade or awl may have been from a Leatherman Tool." How do you have that understanding?

A. The mock-up may include some components from other multi-function tools.

Q. How do you know that?

A. I heard that from Statesboro.

Q. Who at Statesboro told you that?

A. J.J. Vlietstra.

Q. When did Mr. Vlietstra tell you that?

Peter M. Jones – Deposition Excerpt (131)

A. I don't remember the time frame exactly, May or June, somewhere around there.
Q. That was before the lawsuit; was that right?
A. Yes.
Q. Did you know when the mock-up was sent to the advertising agency that it may have contained component parts taken from a Leatherman Tool?
A. I know that it may include components from other multi-function tool manufacturers.
Q. Including a Leatherman Tool; is that right?
A. Yes.
Q. When you were reviewing the advertisements that you saw prepared by Chism for the Cooper Tool, you knew at that time that the photographs of the mock-up – or excuse me, let me flip that – that the mock-up may have contained components taken from a Leatherman Tool; is

that right
(Question read by reporter.)
MR. WINN: Object as vague.
THE WITNESS: Can you say that again?
BY MR. DEKOCK:
Q. Well, you knew in July, when you were reviewing the Chism ads, that the tools depicted may contain components taken from a Leatherman

Peter M. Jones – Deposition Excerpt (132)

Tool; isn't that right?
A. I know that they may contain components from other multi-function tool manufacturers.
Q. Including Leatherman?
A. That may include Leatherman, yes.
Q. And you knew that in July when you were looking at the ads, right?
Yes.
Do you know if the handles of the mock-up were

from a Leatherman Tool?

A. No.

Q. Does anyone know whether the handles in the mock-up were from a Leatherman Tool?

A. I'm not sure.

Q. Is it possible that the handles in the mock-up were from a Leatherman Tool?

MR. WINN: Objection, calls for speculation.

BY MR. DEKOCK:

Q. Answer is yes?

A. Yes, it's possible.

Q. Who would know whether the handles in a mock-up are from a Leatherman Tool?

A. I'm not sure who would know.

Did Mr. Vlietstra tell you why components from

Thad Simmons – Deposition Excerpt (4)

Q. Would you please state your full name for the record and spell your last name?

A. Thad Simmons. S-i-m-m-o-n-s.

Q. Where is your residence address?

A. Post Office Box 28, Rocky Ford, Georgia.

Q. You live in Rock Ford, Georgia?

A. Uh, huh.

Q. So you're represented by Mr. Winn this morning, is that right?

A. That's correct.

Q. Have you ever had your deposition taken before?

A. No, I haven't.

MR. DEKOCK: I'll give you a little brief rundown of what a deposition is about. It's an opportunity for the lawyers to ask questions of witnesses and for the witnesses to give answers to the best of their ability. What we say this morning will be written down so it's

important for us to get clear and audible answers and it's important for you to say "yes" or "no" instead of "uh-huh" or "uh-uh" or nodding. Is that clear?

A. Yes.

Q. If I ask you a question that you don't understand, I'd like you to stop and ask me to explain the question

Thad Simmons – Deposition Excerpt (14)

A. No.

Q. Did you give them to somebody?

A. Yeah.

Q. Who did you give them to?

A. Um . . . J.J.

Q. When did you give the prototypes to Mr. Vlietstra?

A. Again, I don't . . . I couldn't give you a date.

Q. Do you recall anyone ever requesting a prototype to be used for photographing, for advertisements?

A. No.

Q. Did you ever make any prototypes that contained

components from a Leatherman Tool?

A. Yes.

Q. Do you know what happened to those prototypes?

A. No.

Q. How many prototypes did you made that had Leatherman Tool components in them?

A. One.

Q. What components from a Leatherman Tool were in that prototype?

A. The blades.

Q. What do you mean blades?

A. Components that go in . . .

Q. Well, the knife blade . . . was that from a Leatherman Tool?

Thad Simmons – Deposition Excerpt (15)

A. Yeah.

Q. How about the file?

A. Yes.

Q. How about the large screwdriver?

A. Yeah.

Q. Medium screwdriver?

A. Yes.

Q. Small screwdriver?

A. Yes.

Q. Can opener?

A. Yes.

Q. Awl?

A. Yes.

Q. Phillips screwdriver?

A. Yes.

Q. Pliers head?

A. No.

Q. What pliers head was used?

A. I change that . . . plier head, yes.

Q. How about the handles?

A. Yes.

Q. How about the fasteners?

A. No.

Q. What were the fasteners?

A. Star shaped.

Thad Simmons – Deposition Excerpt (16)

Q. Were they like the fasteners shown on the tool on Exhibit #73?

A. They were like the ToolZall fasteners.

Q. Are they like the fasteners shown on the tool in Exhibit #73?

A. I can't really tell from them. It's like the ToolZall.

Q. On this prototype that had the Leatherman components on it, were there any Leatherman trademarks on that tool?

A. No.

Q. What happened to the Leatherman trademarks?

13 A. They were ground off.

14 Q. So the Leatherman mark on the pliers head was

15 ground off?

16 A. I don't know.

17 Q. Was the Leatherman mark on the handles ground off?

18 A. Yes.

19 Q. What happened to that prototype?

20 A. I don't know.

21 Q. Who did you give that prototype to?

22 A. J.J.

23 Q. When did Mr. Vlietstra ask for that prototype?

24 A. Dates . . . I can't remember. I don't know.

25 Q. Was Mr. Vlietstra the one who requested that

1 prototype?

2 A. Yes.

3 Q. Did he tell you why he wanted a prototype with all

4 of those Leatherman Tool components in it?

5 A. No.

6 Q. Did he tell you that he wanted a prototype with

7 Leatherman Tool components in it?

8 A. Yes.

9 Q. Which components did Mr. Vlietstra request to be

10 from a Leatherman Tool?

11 A. The one named before.

12 Q. So Mr. Vlietstra requested that the pliers be from

13 a Leatherman Tool?

14 A. The pliers, I'm not sure. I don't remember on the

15 pliers.

16 Q. Did Mr. Vlietstra request that the knife be from a

17 Leatherman Tool?

18 A. Yeah.

19 Q. Did Mr. Vlietstra request that the knife be from a

20 Leatherman Tool?

21 A. Yeah.

Q. Did Mr. Vlietstra request that all of the components be from a Leatherman Tool other than the fasteners?

A. Yeah.

Q. I want to talk for a little while about the mockup tool.

A. Okay.

Q. Do you recall receiving a mockup tool?

A. Yes, I do.

Q. How many did your receive?

A. One.

Q. When did you receive that?

A. I would say it was in late June '96.

Q. From whom did you receive it?

A. Pete Jones.

Q. What did you do with the mockup once you receive it?

A. I gave it to Dave Sendall.

Q. Did you inspect it before you sent it off?

A. No.

Q. Did you look at any of the details of the

23 tool before you sent it off?

24 A. No.

25 Q. The tool that you received, did it have any

3 A. I can't answer that question. I don't have

4 that knowledge.

5 Q. But it's your understanding that the marks

6 were removed because Cooper's tool didn't

7 have any marks there; is that correct?

8 A. When this photograph was taken, we were under

9 the same type of deadlines. This was a

10 photograph of the prototype --

11 Q. Correct.

12 A. – which I've already explained to you was --

13 my understanding, was exactly as our product

14 would look. And the marks would have been --

15 I would have instructed them to be removed.

16 Q. You instructed that the marks be removed?

17 That was your instruction?

18 A. Yes.

19 Q. Why did you give that instruction?

A. I was directed to give that instruction.

Q. Who directed you to give that instruction?

A. Pete Jones.

Q. Why did Mr. Jones – did Mr. Jones tell you why he was giving you that instruction?

A. No. Other than our product wouldn't have

William R. Bliss – Deposition Excerpt (74)

those marks.

Q. Did he say that?

A. I don't recall specifically, but if he said to remove those – that semi-circle, that's what I instructed the agency to do.

Q. But you're certain you received that instruction from Mr. Jones?

A. Yes. I would not do that on my own.

Q. Why not?

A. I wouldn't make a significant change like that unless I was told to do that.

Q. So removing the marks around the pivot joint was a significant change?

A. Yeah. That's a – in terms of advertising, in terms of what the product looks like --

Q. Yes.

A. – yeah.

Q. Did Mr. Jones tell you what, if any, marks would appear on the Cooper ToolZall in the actual finished product?

A. No, he didn't. Not to my knowledge.

Q. Have you ever seen a ToolZall, that was actually sold by Cooper, that had marks like this, an indentation with a "Crescent" and an